NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The Honorable Michael K. Powell
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20554

Re: CS Docket No. 98-120, NAB ExParte of March 27, 2002

Dear Chairman Powell:

In its Further Notice of Proposed Rulemaking in the above-referenced proceeding, the Commission is seeking to assess the burden that would be imposed on cable operators if they were required, during the transition to digital broadcasting, to carry both the analog and the digital signals of local broadcast stations. As part of that process, the Commission surveyed cable operators regarding their current and expected capacity and their current and anticipated uses of that capacity.

On August 16, 2001, the National Association of Broadcasters ("NAB") submitted a report prepared by the Merrill Weiss Group ("MWG"), which purported to show, on the basis of the responses to the Commission's survey, that a dual must carry requirement would not impose a significant burden on cable operators. On October 16, 2001, NCTA submitted an analysis of MWG's report, prepared by PDS Consulting. That analysis showed that MWG's analysis was insufficient to support its conclusion regarding the burden of dual must carry. PDS showed that MWG's analysis of the survey data ignored certain factors that need to be taken into account in order to assess accurately the extent of the burden. And it showed that MWG's analysis of the relevant factors that it did consider was flawed in a manner that understated their effect on the burden.

Now, six months later, NAB has submitted a response by MWG to the PDS analysis. See Letter from Henry L. Baumann to Chairman Powell (March 27, 2002). That response makes clear a new and significant deficiency in the MWG analysis: MWG's conclusions were largely based on erroneous legal assumptions as to what is and is not burdensome for purposes of assessing the constitutionality of a dual must carry requirement.

First, MWG has apparently been proceeding on the assumption that so long as the number of channels that operators are required to carry does not exceed one-third of their usable channel capacity, the burden will not raise constitutional problems. Thus, MWG asserts that "[i]n the Turner cases, the Supreme Court held that the mandated cable carriage of local broadcast stations up to the one-third capacity limit in the statute was constitutional. . . ." MWG Response at 4 (footnote omitted). Therefore, because MWG's initial report "demonstrate[d] that all commercial stations could fit within the capacity limit," and because "nothing in the PDS Report indicates that that limit would be exceeded by carriage of the number of stations in the largest markets," id. at 7, MWG assumes that it has shown that the burden is of no constitutional significance.

The Supreme Court, of course, held no such thing. In assessing whether the burden imposed by the must carry requirements of the statute were permissible, it paid no attention to the one-third cap on channel capacity. What it held was that the actual burden on operators of being required to carry all local analog signals was not problematic. It so concluded because most local signals were already being carried voluntarily by cable systems, and "the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so." Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 215 (1997).

If this had not been the case – if cable operators were not already carrying most local stations – the burden, for constitutional purposes, would have been significant and problematic, even though the number of channels required to carry such stations would, in almost all cases, have been far fewer than one-third of a system's usable capacity. And, of course, virtually all the digital signals that cable operators would be required to carry under a dual must carry requirement – one for each local broadcaster, in addition to its analog signal – are signals that operators are not already carrying.

If MWG believes that must carry obligations could not be unduly burdensome as long as they used up less than one-third of an operator's usable capacity, it's no wonder that it concluded that a dual must carry requirement during the transition would not impose a significant burden. But it is wrong on the law, and therefore it has no basis for its conclusion regarding the burden.

Second, MWG misses the point regarding the effect of a dual carriage requirement on other uses of the cable system for pay-per-view, video-on-demand, Internet, or telephony services. PDS pointed out that dual must carry will impinge on use of bandwidth for these innovative services, services that have been encouraged by government to increase communications competition. MWG observes that the relevance of these other uses is narrower than the point raised by PDS , i.e., MWG claims that these uses only come into play because the FCC requires cable systems to count the channels used for these services in calculating the one-third cap on capacity.

But this computational observation overlooks PDS's point regarding the burden of dual carriage on capacity. If a dual must carry obligation uses capacity that would otherwise be used to provide one of these services, then that capacity becomes unavailable, just like DTV broadcaster-occupied channels that could otherwise be used to provide cable programming networks. Loss of this capacity is an added burden on cable operators and weighs negatively in the public interest and constitutional balance in evaluating dual carriage. But because MWG saw no loss to the public by occupying channels used for these other services, it is easy to see why it so readily dismissed the burden of dual carriage in this regard.

Finally, MWG erroneously concludes that because the Supreme Court "cited national averages about cable capacity in concluding that the actual effects of must carry had been modest," it follows that its "use of national averages is reasonable in evaluating the burden placed on cable operators." MWG Response at 4. In its analysis of MWG's initial report, PDS pointed out that in certain specific instances, MWG's use of national averages understated the amount of downstream capacity actually required to comply with a dual must carry requirement. As PDS showed, citing the average number of channels required to be carried by systems nationwide may be misleading because a significant number of systems may have to set aside a much larger number of channels. If that is the case, the Supreme Court's use of some national averages in its analysis in a different factual situation is no precedent here.

In sum, the MWG Report did not show that the burden of a dual must carry requirement would be negligible. It simply – and wrongly – concluded that the substantial burden was constitutionally irrelevant.

Respectfully submitted,

Daniel L. Brenner

cc: Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
W. Kenneth Ferree, Chief, Media Bureau
Dr. Robert Pepper, Chief, Office of Plans & Policy